**HOO KOK CHONG & ANOR**

**v.**

**YONG TIM**

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: P-02-446-1998]
9 DECEMBER 2003

***EVIDENCE:*** *Fresh or further evidence - Admission of, on appeal - Whether reasonable diligence would not have made further evidence available at the trial court - Whether further evidence would have had a determining influence upon the decision of the trial court - Rules of the Court of Appeal 1994, r. 7(3A)*

***LAND LAW:*** *Indefeasibility of title and interests - Fraud - Standard of proof - Whether on a balance of probabilities - Whether trial judge erred when he applied proof of beyond reasonable doubt - Saminathan v. Pappa - Adorna Properties Sdn Bhd v. Boonsom Boonyanit - National Land Code, s. 340(1)*

The plaintiffs brought an action to declare the transfer of two pieces of land ('the lands') to the defendant null and void on the ground of fraud. The learned judge of the High Court held that the plaintiffs failed to prove fraud beyond reasonable doubt and dismissed their claim with costs. Hence, the plaintiffs' appeal. At the hearing of this appeal, the plaintiffs sought to adduce further evidence that was objected to by the defendant.

**Held:**
**Per Mohd Noor Ahmad JCA**

**[1]** The law on the admission of further evidence in the hearing of an appeal is governed by r. 7(3A) of the Rules of the Court of Appeal 1994. It provides that further evidence shall not be admitted unless the court is satisfied that (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be. In the present case, the further evidence sought to be adduced by the plaintiffs was in

existence at the time of the hearing before the High Court but reasonable diligence would not have made it available to the plaintiffs. Further, had this further evidence been available at the trial court, it would have had a determining influence upon the decision of the learned judge. Therefore, the motion to adduce further evidence should be allowed. (pp 270 e-f, 271 c-d & 272 e-f)

**[2]** Under s. 340(1) of the National Land Code, being the registered proprietor of the lands, the title of the defendant in the lands becomes indefeasible. However, the indefeasibility can be defeated by proof of fraud or misrepresentation to which the defendant was a party or privy. The learned judge held that the plaintiffs failed to prove fraud beyond reasonable doubt against the defendant on the authority of *Saminathan v. Pappa*. The learned judge applied the wrong standard of proof on fraud. The proper test was on a balance of probabilities *(Adorna Properties Sdn Bhd v. Boonsom Boonyanit)*. Although the decision of the learned judge was based on the findings of fact and credibility, this court was compelled to interfere with his decision because he had erred on the standard of proof. Further, in light of the new evidence adduced, the plaintiffs had succeeded in proving fraud on the balance of probabilities. (pp 272 f-h & 273 a-f)

*[Appeal allowed.]*

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif-plaintif memulakan satu tindakan untuk pengisytiharan bahawa pindahmilik dua bidang tanah ('tanah-tanah') kepada defendan adalah batal dan tak sah atas alasan fraud. Yang arif hakim Mahkamah Tinggi memutuskan bahawa plaintif-plaintif gagal membuktikan fraud di luar keraguan munasabah dan menolak tuntutan dengan kos. Plaintif-plaintif dengan itu merayu. Di pendengaran rayuan di sini, plaintif-plaintif memohon untuk mengemukakan keterangan lanjutan tetapi ianya dibantah oleh defendan.

**Diputuskan:**
**Oleh Mohd Noor Ahmad HMR**

**[1]** Undang-undang berkaitan penerimaan masuk keterangan lanjut pada pendengaran rayuan dikawalselia oleh k. 7(3A) Kaedah-Kaedah Mahkamah Rayuan 1994. Ia memperuntukkan bahawa keterangan lanjut tidak boleh diterima masuk kecuali jika mahkamah berpuas hati bahawa: (a) pada pendengaran di Mahkamah Tinggi atau mahkamah bawahan, mengikut mana yang terpakai, keterangan lanjut tidak diperolehi oleh orang menginginya, ataupun bahawa keterangan tersebut tidak dapat diperolehi melalui usaha-

usaha yang munasabah; (b) keterangan baru tersebut, jika ianya benar, akan atau berkemungkinan akan mempengaruhi secara putus akan keputusan Mahkamah Tinggi atau mahkamah bawahan, mengikut yang mana yang terpakai. Dalam kes semasa, keterangan lanjut yang hendak dikemukakan oleh plaintif-plaintif memang wujud sewaktu pendengaran di Mahkamah Tinggi tetapi usaha-usaha munasabah plaintif-plaintif tidak akan berjaya memperolehinya. Selain itu, jika keterangan tersebut dikemukakan kepada mahkamah perbicaraan, ia akan mempengaruhi secara putus akan keputusan yang arif hakim. Dengan demikian, usul untuk mengemukakan keterangan lanjut harus dibenarkan.

**[2]** Di bawah s. 340(1) Kanun Tanah Negara, defendan, selaku pemilik berdaftar tanah-tanah, mempunyai hakmilik tak boleh disangkal. Bagaimanapun, hakmilik sedemikian boleh terhapus jika fraud atau salah nyata dapat dibuktikan di mana defendan terbabit dengannya. Yang arif hakim mendapati bahawa plaintif gagal membuktikan fraud di luar keraguan munasabah terhadap defendan berdasarkan autoriti *Saminathan lwn. Pappa.* Yang arif hakim telah memakai beban bukti yang salah mengenai fraud. Ujian yang betul adalah atas imbangan kebarangkalian *(Adorna Properties Sdn Bhd lwn. Bonsoom Boonyanit).* Walaupun keputusan yang arif hakim didasarkan kepada dapatan fakta dan kebolehpercayaan, mahkamah ini merasa terpanggil untuk mengganggu keputusannya oleh kerana beliau telah khilaf tentang beban bukti. Selain itu, mengambilkira keterangan baru yang dikemukakan, plaintif-plaintif telah berjaya membuktikan fraud atas imbangan kebarangkalian.

*Rayuan dibenarkan.]*

**Case(s) referred to:**
*Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC* ***(diikuti)***
*Saminathan v. Pappa [1981] 1 MLJ 121* ***(tidak diikuti)***

**Legislation referred to:**
National Land Code, ss. 168(a), 340(1), (3)
Rules of the Court of Appeal 1994, r. 7(3A)

*For the plaintiffs/appellants - A Silvanathan (M Mathialagan); M/s Madhi Param & Co*
*For the defendant/respondent - Ng Poh Tan (Ng Whui Cheng); M/s Ng Poh Tat & Co*

*[Appeal from High Court, Taiping; Civil Case No: 22-4-1992(91)]*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Mohd Noor Ahmad JCA:**

In this action, the plaintiffs sought for a declaration that the transfer of two pieces of land held under EMR 1265 Lot 1346 and EMR 1266 Lot 1347, Mukim of Selama, Perak (the lands) from one Hor Choy (the deceased) to the defendant was null and void and for other consequential orders. The learned judge of the High Court dismissed the claims with costs. Hence, this appeal. We heard the appeal on 14 January 2002. However, the hearing was adjourned to a date to be fixed to enable the plaintiffs' solicitors to verify certain facts. The hearing was resumed on 7 February 2003. At the resumed hearing, the plaintiffs' counsel moved a motion to adduce further evidence which was objected by the defendant. We allowed the motion with no order as to costs. Ultimately, we allowed the appeal with costs here and below and ordered the deposit to be refunded. Here are our reasons.

Briefly, the deceased was the grandfather of the plaintiffs. The registered owner of the lands was the deceased. It was alleged that on 30 December 1966, the deceased executed a trust deed in favour of the plaintiffs who were then minors. The trustee was the deceased. Under the trust deed, upon the death of the deceased the lands would be transferred to the plaintiffs; however, during his lifetime he was entitled to sell the lands. On 26 November 1969, the deceased died. Thereafter, the plaintiffs' father (PW3) took over the control of the lands. It was alleged that the plaintiffs' father allowed the defendant to use the lands. In 1984, after attaining the age of majority, the plaintiffs approached the defendant for the return of the lands. The defendant refused claiming that he had purchased the lands from the deceased in Jun 1969 for a consideration of RM10,400 and that he was the legal owner of the lands since 1969. The defendant also claimed that he had applied for and obtained titles in continuation in respect of the lands in 1976, nos. GM 316 and GM 317, respectively.

The further evidence sought to be adduced by the plaintiffs consists of:

(a) a letter dated 6 February 2002 from the Ketua Penolong Pegawai Daerah, Selama confirming:

(i) the original titles to the lands had been removed from the Registered Document of Title Book (the RDT) and lost from the possession of the Land Office;

(ii) the transfer of the lands to the defendant was registered on 7 March 1975 at 10.15am as evident from the Presentation No. 71/75 obtained from the Presentation Book of 1975. An extract of the Presentation was attached to the letter; and

(iii) Form 14A relating to the transfer *vide* Presentation No. 71/75 Jil. l Fol.63 had also been removed from the Register of Documents of 1975 and lost from the possession of the Land Office; and

(b) a letter dated 11 February 2002 from Pengarah Ukur dan Pemetaan, Perak stating that the Department could not trace the Original file on the first survey done on the Lands in 1915. However, an extract of the Confirmed Plan of the lots in respect of the Lands and an extract of the Gazette Notifications nos. 838 and 839 dated 19 November 1995 were attached to the letter. The Gazette Notifications are in respect of the exercise of power by the Land Administrator under s. 168(a) of the National Land Code (the NLC). They reveal that the issued original titles of the lands were declared lost by the defendant for the purpose of the issuance of the titles in continuation.

The learned counsel for the defendant in objecting to the motion contended that the plaintiffs failed to show that the new evidence could not have been obtained with reasonable diligence for use at the trial and that had the new evidence been adduced at the trial it would not have had or would not have been likely to have had an important influence on the result of the case.

Before we proceed to consider the issue of further evidence, certain pertinent facts as revealed in evidence at the trial need to be highlighted. They are:

(i) PW1, the Assistant Land Administrator admitted that he had no personal knowledge about the documents he brought from the Selama Land Office for the purpose of the trial. One of the documents he brought was the Presentation Book. He deposed that he had checked all the entries in the Presentation Book from presentation no. 8948 dated 2 January 1969 to presentation no. 9417 dated 30 December 1969 and found that there was no record of any transfer of the lands during that period. Whatever document of dealings presented must be registered in the Presentation Book. If there was any transfer in Jun 1969 and if the transaction was executed before the Assistant Land Administrator, the transfer must be registered in the Presentation Book. It would also be registered in the RDT. Further, he deposed that the title of the lands appeared in the Current Rent Roll which indicated that the titles to the lands existed but the original titles to the lands were missing from the RDT which meant that the titles had been tampered with in the sense that they had been removed from the RDT. He also deposed that, from the titles in continuation, the defendant was the registered owner of, the lands on 13 February 1976. On the procedure relating to the issuance of title in continuation he stated that the applicant must apply to the land office supported by a statutory declaration stating

the reason for the application. The application would then be submitted to the Survey Department. The submission did not contain the name of the registered owner but only the lot number, grant number and the location of the land were stated therein. Subsequently, the Survey Department would send a new title in blank to the land office. The blanks would then be filled up by the registration clerk with the particulars obtained from the issued original title kept in the relevant file. If it was declared lost the particulars would be obtained from the original title in the RDT. Finally, if everything was in order, the new title would be signed by the Land Administrator. In this particular case, there was no record of the application including the statutory declaration made by the owner of the lands for the issuance of the title in continuation.

(ii) the defendant claimed that he purchased the lands from the deceased in Jun 1969;

(iii) there was no sale and purchase agreement signed between the defendant and the deceased in respect of the purchase; and

(iv) there was no written receipt in respect of the alleged payment of RM10,400 for the consideration.

The law on the admission of further evidence in the hearing of an appeal is governed by r. 7(3A) of the Rules of the Court of Appeal 1994. It provides that further evidence shall not be admitted unless the court is satisfied that:

(a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

We are of the view that the application to adduce further evidence in this case must be considered in the light of the aforesaid evidence revealed at the trial. It is manifestly evident that there are real uncertainties in the evidence relating, in particular to the alleged transfer of the lands from the deceased to the defendant in June 1969 and the issuance of the title in continuation to the defendant. The uncertainties are due not only to the non-availability of the pertinent records in the land office and the lack of personal knowledge on the part of PW1 about the documents tendered in court but also by the averment of the defendant in paras. 4 and 6 of the statement of defence that he bought the lands from the deceased in June 1969 which he deposed to the same effect

at the trial. To us, what matters most is that averment of the defendant. The averment gave the specific time of the purchase. That being the case, it is reasonable to expect that, at the preparatory stage before the trial, the plaintiffs or their solicitors had to focus their search in the Presentation Book at the land office only in respect of entries pertaining to all dealings for the year of 1969. To place a burden on them to carry out the search through the entries made in the Presentation Book from 1969 to 1975 would be illogical and unjust because of the tremendous task they had to do for which they did not expect to do or need not do. Of course, if they have had prior knowledge of the transaction of 7 March 1975 they had to carry out that task. That accounts for the need to adduce further evidence as stated in para. 3(1)(a)(ii) and (iii) above. Therefore, we are satisfied that although this new evidence was in existence at the time of the hearing before the High Court, reasonable diligence would not have made it available to the plaintiffs. With regard to further evidence as stated in para. 3(1)(a)(i) above, this is merely a confirmation of PW1's evidence already adduced at the trial. And the further evidence as stated in para. 3(1)(b) above is just a confirmation of what the defendant (DW1) deposed at the trial. Having regard to the uncertainties in the evidence as aforesaid and the aforesaid reasons for the uncertainties we are also satisfied that reasonable diligence would not have made this new evidence available to the plaintiffs at the hearing before the High Court. Next, we have to consider whether the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the learned judge. As stated earlier, the defendant claimed that he bought the lands from the deceased in June 1969 and that he was the legal owner of the lands since then; and PW1, who checked all the entries in the Presentation Book for the whole year of 1969 found no record of such dealing in respect of the lands. However, from the new evidence as stated in para. 3(1)(a)(ii) and (iii), it is manifestly evident that the alleged transfer of the lands to the defendant was registered only on 7 March 1975 at 10.15am, nearly some six years later. To our mind, the extract of the relevant Presentation, being a public document which was produced from proper custody, bears the stamp of truth, that is to say, the alleged transfer was registered on 7 March 1975. Therefore, the claim by the defendant as deposed in evidence that he bought the lands in 1969 and that he became the legal owner of the lands since then could not have been true. Even on the assumption that Form 14A was executed for the purpose of the transfer in June 1969, as the defendant claimed, he could not have been the legal owner but only beneficial owner of the lands since 1969 because the non-registration of the transfer under the NLC does not confer on him the legal ownership to the lands. However, by reason of (i) the fact that the relevant Form 14A had been removed from the Register of Dorments of 1975 and hence, its loss from the possession of the land office, (ii) the non-existence of any sale and purchase

agreement in respect of the purchase of the lands by the defendant and (iii) the absence of any receipt for the payment of the consideration, we are inclined to belief that the transfer of the lands to the defendant could not have been transacted in June 1969, as claimed by the defendant but sometime later, on or about 7 March 1975. We are fortified in our belief by the fact gathered from Presentation No. 71/75 (re-extract mentioned in para. 3(1)(a)(ii) above) that only the registration fee of RM20 was charged for the two titles but not the penalty for late registration as compared to Presentation No. 75/75 in the same extract where it is shown that the registration fee of RM10 was charged for one title and a further RM10 was charged for 'Bayaran Lambat'. That being the case, the deceased could not have been a party to the execution of Form 14A, as the vendor, because he had died about six years earlier. On the issuance of the title in continuation, the defendant deposed that after the payment of the purchase price he waited about three years in order to get the titles to the lands but PW3 did not hand over the land titles to him and thereafter, he made a statutory declaration and applied for new land titles from the land office. However, as revealed by the extract of the Gazette Notifications as mentioned in para. 3(1)(b) above, the defendant declared that the issued original titles to the lands had been lost. This could not be true because he ought to have been aware that the land titles must have been kept by PW3 otherwise he would not have waited for three years for PW3 to hand them over to him. Further, there is no evidence that he had verified with PW3 that the land titles were lost before he made such declaration. Therefore, for the aforesaid reasons we are satisfied that the new evidence, had it been available at the trial, would have had a determining influence upon the decision of the learned judge.

Under s. 340(1) of the NLC, being the registered proprietor of the lands, the title of the defendant in the lands becomes indefeasible. However, under sub-s. (2)(a) of the section, the indefeasibility can be defeated by proof of fraud or misrepresentation to which the defendant was a party or privy. The plaintiffs had alleged fraud against the defendant based on the following particulars as set out in para. 5 of the statement of claim:

(a) no sale of land by the deceased to the defendant in 1969;

(b) the deceased died in 1969;

(c) no consideration was given to the deceased;

(d) the defendant had forged the signature of the deceased; and

(e) the defendant, through fraud, had the lands transferred into his name.

The learned judge held that the plaintiffs failed to prove fraud beyond reasonable doubt against the defendant. He relied on the authority of *Saminathan v. Pappa* [1981] 1 MLJ 121, a Privy Council case. With due respect, the learned judge applied the wrong standard of proof on fraud. The proper test is that on a balance of probabilities (see *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133, FC).

Now, we have to consider whether, in the light of the new evidence, the plaintiff had succeeded in proving fraud on the balance of probabilities against the defendant. We do realize that there is no evidence at all that the defendant was responsible for or has had a hand in the removal of the original titles to the lands from the RDT and the removal of Form 14A relating to the transfer *vide* Presentation No. 71/75 Jil. 1 Fol. 63 from the Register of Documents of 1975. However, he had a hand in obtaining the titles in continuation to the lands wherein, as aforesaid, he had misrepresented in his statutory declaration that the land titles had been lost. On this fact coupled with the facts, as aforesaid, that he could not be the legal owner of the lands since 1969 and that the deceased could not have been the party to the execution of Form 14A, as the vendor, because he had died about six years earlier, we are satisfied that the plaintiffs had succeeded in proving fraud on the balance of probabilities against the defendant. Further, for the same reason, the defendant could not be regarded as a purchaser in good faith and for valuable consideration under the proviso to s. 340(3) of the NLC.

Although the decision of the learned judge was based on the findings of fact and credibility, we are compelled to interfere with his decision because he had erred on the standard of proof on fraud and in the light of the new evidence.